Voluntary Compliance on Alien Withholding Program

Rev. Proc. 2001–20

Offer to resolve issues arising from certain tax, withholding, and reporting obligations of public and other not-for-profit colleges and universities with respect to payments to alien individuals.

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SECTION 1. GENERAL

.01 *Background*. This revenue procedure describes the Voluntary Compliance on Alien Withholding Program ("VCAP"), which is available to certain public and other not-for-profit colleges and universities, and their charitable affiliates, with respect to the payment, withholding, and reporting of certain taxes due on payments made to alien individuals.

The Internal Revenue Service ("Service") will begin VCAP as a temporary and experimental program. See section 6 of this revenue procedure for the effective date and sunset date of VCAP. See section 2 of this revenue procedure for the organizations that are eligible to participate in VCAP (eligible organizations). See section 3 of this revenue procedure for the taxes, including excise

taxes, and the withholding and reporting obligations covered by VCAP.

.02 *Applicable law*. The objective of VCAP is to enhance voluntary compliance among public and other not-for-profit colleges and universities, and their affiliated charitable organizations, making payments of wages, grants, scholarships, and other income to alien individuals. Generally, income received by a nonresident alien individual from sources within the United States is subject to tax under § 871(a) of the Internal Revenue Code ("Code") unless an exception applies. The tax is imposed, generally on the gross amount of income, at a 30-percent rate if the income is not effectively connected with the conduct of a trade or business in the United States or at a 14-percent rate in the case of income from certain scholarships, fellowships and grants. Section 1441 of the Code requires any person who pays income subject to tax under § 871(a) of the Code to a nonresident alien individual to deduct and withhold the 30% (or 14%) tax from the gross amount paid. The rate of tax, and therefore withholding, may be reduced or eliminated under an income tax treaty. A withholding agent may rely on a claim of treaty benefit if the nonresident alien individual has furnished appropriate documentation. See § 1.1441 –6 of the Income Tax Regulations. See also IRS Publication 515, *Withholding of Tax on Nonresident Aliens and Foreign Corporations*, and IRS Publication 901, *U.S. Tax Treaties*.

Section 871(b) of the Code imposes a graduated rate of tax on a nonresident alien individual's income that is effectively connected with the individual's conduct of a trade or business in the United States. This provision is relevant to income earned for personal services because, under § 864(b) of the Code, the performance of personal services in the United States is considered to be the conduct of a trade or business within the United States. Further, under § 871(c) of the Code, a nonresident alien individual with a specified nonimmigrant status who is a participant in certain exchange or training programs is treated as being engaged in a trade or business within the United States (regardless of whether he is actually so engaged) with regard to income derived in connection with that exchange or training program. A nonresident alien individual's effectively connected services income may also be subject to withholding under § 1441 of the Code (or § 3402 of the Code for most income constituting wages). With respect to reporting obligations, a nonresident alien individual's effectively connected personal services income constituting wages under § 3402 of the Code is subject to wage reporting under chapter 61 of the Code (i.e., on Form 941 and Form W-2), and such individual's nonwage income is subject to reporting under § 1.1461–1(c)(2) of the Income Tax Regulations (i.e., on Form 1042 and Form 1042–S). Additionally, taxes may be imposed on wages paid to alien individuals under §§ 3101 and 3111 of the Code (social security and Medicare taxes).

.03 *Definitions*. For purposes of this revenue procedure, the following definitions apply:

(1) The term "alien individual" means an individual who is not a citizen or a national of the United States. See § 1.1–1(c) of the Income Tax Regulations.

(2) The term "resident alien" means an alien individual described in § 7701(b)(1)(A) of the Code.

(3) The term "nonresident alien" means an alien individual described in § 7701(b)(1)(B) of the Code.

.04 *Summary of VCAP*. Organizations that request consideration under VCAP agree to (1) identify those areas in which they are not in compliance with tax, withholding, and reporting obligations on payments to alien individuals; (2) compute and pay any tax due; and (3) institute procedures and policies which will assure compliance in the future with the organization's tax, withholding, and reporting obligations. Organizations will receive assurance that their proposed procedures and policies relating to tax, withholding, and reporting obligations applicable to alien individuals are acceptable to the Service, and the Service generally will not impose penalties for identified underpayments or deficiencies, if the liability is due to reasonable cause. See sections 5.02(3) and 5.06 of this revenue procedure.

.05 *No waiver of excise tax, FICA, or other tax obligations*. VCAP does not waive or reduce any applicable tax and does not alter an employer's obligations to satisfy any applicable Federal Insurance Contributions Act (FICA) or Federal income tax withholding requirements with regard to any employee. (However, see §§ 3121(b)(10) and 3121(b)(19) of the Code for certain tax-exempt wages.) In addition, VCAP does not affect any other obligations of the taxpayer or the Service that are not within the scope of this revenue procedure or the acknowledgment described in section 5.06 of this revenue procedure.

.06 *Request for comments*. Because of the experimental nature of VCAP, the Service welcomes comments on the format and operation of this program, including suggestions regarding whether the program should be expanded to cover other organizations, such as proprietary colleges and universities and other educational organizations, not listed in section 2 of this revenue procedure, or other types of defects not listed in section 3 of this revenue procedure. The Service also welcomes suggestions regarding possible standardized correction methods for specified defects that could be appropriately addressed under VCAP. Any modifications will be made only by announcements, revenue procedures, notices or other guidance published in the Internal Revenue Bulletin. Comments on VCAP should be mailed to:

Internal Revenue Service
Attention: T:EO:RA:T:G (VCAP)
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Comments may also be sent electronically via the Internet to *TE/GE-EO-3@irs.gov.

SEC. 2. ELIGIBLE ORGANIZATIONS

.01 Eligible Organizations. Except as provided in section 2.02, an organization is eligible for VCAP (an "eligible organization") if it is:

(1) A college or university described in § 170(b)(1)(A)(ii) of the Code that is:

(a) Exempt from tax under § 501(a) of the Code as an organization described in § 501(c)(3); or

(b) An agency or instrumentality of any government or any political subdivision thereof, or that is owned or operated by a government or any political subdivision thereof, or by an agency or instrumentality of one or more governments or political subdivisions (a "State college or university"); or

(2) An organization described in § 501(c)(3) of the Code and exempt from income tax under § 501(a) that is affiliated with such a college or university.

An eligible organization may apply for VCAP with respect to any payments made to alien individuals.

.02 *Organizations currently under examination*. An organization is not eligible for VCAP if the organization is under examination on the date of the publication of this revenue procedure, or comes under examination prior to submitting the information required by section 4 of this revenue procedure. For this purpose, an examination is treated as commencing on the date the organization received notification from the Service of an impending examination or of an impending referral for examination. This program is also not available to any organization that has a case pending in Appeals or in litigation on issues involving taxes or withholding obligations described in section 3 of this revenue procedure.

SEC. 3. TAX, WITHHOLDING, AND REPORTING OBLIGATIONS SUBJECT TO VCAP

The defects for which an eligible organization may make a submission under VCAP are:

(1) Failure to pay the correct amount of social security and Medicare excise taxes imposed on employers with respect to wages paid to alien individuals (§ 3111(a) and § 3111(b) of the Code);

(2) Failure to withhold or pay the correct amount of social security and Medicare taxes imposed on employees with respect to wages paid to alien individuals (§ 3101(a) and § 3101(b) of the Code);

(3) Failure to withhold or pay the correct amount of income taxes on wages paid to alien individuals (§ 3402 of the Code);

(4) Failure to withhold or pay the correct amount of income taxes on scholarships, fellowships and grants paid to nonresident alien individuals (§§ 1441—1464 of the Code);

(5) Failure to withhold or pay the correct amount of taxes on compensation for independent personal services paid to nonresident alien individuals (§§ 1441—1464 of the Code);

(6) Failure to withhold or pay the correct amount of taxes on royalties or other types of taxable income paid to nonresident alien individuals (§§ 1441–1464 of the Code); and

(7) Failure to report the correct amount of any or all of the taxes listed above (§§ 1441–1464 and 6011 of the Code).

SEC. 4. SUBMISSION PROCEDURES

.01 *In general*. In general, an eligible organization submits a request under VCAP through a letter to the Tax Exempt/Government Entities (TE/GE) office at the address in section 4.08 of this revenue procedure. The submission must contain the information and documentation described in sections 4.02 and 4.03 of this revenue procedure. The Service will not accept anonymous submissions under VCAP.

.02 *Required information*. The request for consideration under VCAP must contain the following information:

(1) The name, address, and taxpayer identification number of the eligible organization.

(2) A description of the current administrative procedures that the eligible organization uses to determine tax, withholding, and reporting obligations regarding payments to alien individuals.

(3) A description of the defects in the eligible organization's tax, withholding, and reporting procedures for payments to alien individuals, how and why the defects occurred, and the years affected by such defects.

(4) The number of alien individuals affected and how the number was determined.

(5) The number of any affiliated charitable organizations affected by the defects, their names, addresses, and taxpayer identification numbers.

(6) A calculation of the total amount of taxes the eligible organization failed to withhold, pay and/or report, not including interest and penalties, for tax periods open for assessment or collection under the provisions of § 6501 of the Code. This calculation should take into account properly substantiated adjustments under §§ 1463 and 3402(d) of the Code. The eligible organization must agree to pay and remit all of its additional tax due and owing plus interest at the completion of the Service's review or examination. See section 5 of this revenue procedure. (However, regarding the non-assertion of interest, see section 5.02(2) of this revenue procedure.) In certain cases involving large liabilities or underpayments, the Service will consider the organization's proposal for payment of the liability or underpayment in more than one installment, or will consider the organization's posting of a cash bond under the procedures outlined in Rev. Proc. 84–58, 1984–2 C.B. 501. See section 5.02(4) of this revenue procedure.

(7) A detailed description of the methods for correcting the defects that the organization has implemented or proposes to implement. Those methods must ensure that the correct amount of taxes and withholding of taxes on payments to alien individuals will be withheld, paid over, and reported to the Service on the proper forms and in a timely manner.

(8) A statement signed by the eligible organization's officer or authorized representative acknowledging and agreeing that the eligible organization's participation in VCAP will not constitute an employment tax audit of the eligible organization and will not provide a reasonable basis for not treating an individual as an employee under § 530 of the Revenue Act of 1978.

.03 *Required documents*. The submission must be accompanied by the following documentation:

(1) In the case of a college or university, a copy of the organization's determination letter indicating that it is an organization described in §§ 170(b)(1)(A)(ii) and 501(c)(3) of the Code, or sufficient documentation indicating that the organization is a State college or university. In the case of an affiliated charitable organization, the organization must provide both a copy of its determination letter indicating that it is an organization described in § 501(c)(3) of the Code and sufficient documentation indicating its relationship to a college or university that is itself an eligible organization.

(2) Copies of workpapers or schedules that clearly explain the eligible organization's calculation of its correct tax liability regarding payments to alien individuals (see section 4.02(6) of this revenue procedure). The workpapers or schedules should also show to which specific tax returns and tax periods the liability relates.

(3) Copies of the original Forms 941, 945, 1042, if any, as filed that relate to the above calculations.

(4) Copies of Forms 8233, 1001, W-8BEN, W-9, or sufficient information to support tax treaty claims.

(5) In cases involving the failure to pay the correct amount of social security and Medicare excise taxes imposed on employers with to respect wages paid to alien individuals (§ 3111(a) and § 3111(b) of the Code), and the failure to withhold or pay the correct amount of social security and Medicare taxes imposed on employees with respect to wages paid to alien individuals (§ 3101(a) and § 3101(b) of the Code), a description of how Forms W-2C will be prepared and provided to affected employees and the Social Security Administration.

.04 *Signatures*. The submission must be signed by an officer of the eligible organization who is authorized to sign or the eligible organization's authorized representative.

.05 *Power of Attorney requirements*. To sign the submission or to appear before the Service in connection with the submission, a representative must comply with the requirements of section 9 of Rev. Proc. 2001–4, 2000–1 I.R.B. 135.

.06 *Penalty of perjury statement*. The following declaration must accompany a VCAP submission and any factual information submitted after the original submission or any change in the submission at a later time: **"Under penalties of perjury, I declare that I have examined this submission, including accompanying documents, and to the best of my knowledge and belief, the facts presented in support of the VCAP request are true, correct, and complete."** The declaration must be signed by the eligible organization's officer, not the organization's representative.

.07 *Marked letter and marked envelope*. The letter which transmits the submission to the Service must be marked "VCAP" in the upper right-hand corner of the letter, and the envelope containing the submission must be marked "VCAP" in the lower left-hand corner of the envelope.

.08 *Mailing address*. The submission must be mailed to the address shown below. The Service may issue an announcement later which contains other addresses for the mailing of VCAP submissions.

Internal Revenue Service
Roger Greening
Manager EPP
1100 Commerce Street
MC: 4910DAL
Dallas, TX 75242

SEC. 5. PROCESSING OF VCAP REQUESTS

.01 *Inadequate or incomplete submission or request for additional information*. If the submission fails to comply with the provisions of this revenue procedure or the Service requires additional information, the Service representative assigned to the case will contact the eligible organization or its representative and explain what is needed to complete the submission. The organization will have 90 business days from the date of this contact to provide the requested information. Any request for an extension of the 90-day time period must be made prior to expiration of the period, and must be approved by the TE/GE Area Manager of the appropriate TE/GE Area Office, or his or her designated representative. If the requested information is not received within 90 business days, or an agreement cannot be reached on correction or administrative procedures, the matter will be closed, and the Service may consider the case for examination.

.02 *Determining tax liability*. Once the Service accepts the submission under VCAP, the Service will analyze the eligible organization's calculation of its tax liability regarding payments to alien individuals, and will analyze the accompanying workpapers, schedules, and returns which support such calculation. The Service will generally apply the following approach to determine the tax liability of an eligible organization:

(1) The Service will normally allow tax treaty benefits in the computation of any adjustments to taxes and withholding of taxes on payments to nonresident alien individuals, even in the absence of Forms 8233, 1001, W-9, or W-8BEN if the eligible organization has acted in good faith and provides sufficient information to support the treaty claims.

(2) Interest on the eligible organization's underpayments will be due from the last date prescribed for payment of the taxes (determined without regard to VCAP or any extension of time for payment) to the date on which payment is received; provided, however, that interest-free adjustments of underpayments of certain employment taxes may be made in accordance with § 6205(a)(1) of the Code, Proposed Treas. Reg. § 31.6205–1(b) and (c), and Rev. Rul. 75–464, 1975–2 C.B. 474.

(3) The Service will not assert any penalties on the eligible organization's liability, if the organization's failure to withhold, pay, and report taxes as described in section 1 of this revenue procedure, is due to reasonable cause.

(4) In certain cases involving large liabilities, the Service will consider the eligible organization's proposal for payment of the liability in more than one installment. See Internal Revenue Manual (IRM) Handbook 4.3.2, Examination Collectibility Handbook, Chapter 4, Installment Agreements (05–25–2000). Applicants may also wish to avail themselves of the procedures for making a deposit in the nature of a cash bond as contained in Rev. Proc. 84–58, 1984–2 C.B. 501.

.03 *Review of Eligible Organization's compliance procedures*. The eligible organization must demonstrate to the satisfaction of the Service that it has implemented (or it has plans for implementing) policies and procedures that ensure that the correct amount of taxes and withholding of taxes on payments to alien individuals are reported and paid over to the Service on the proper forms and in a timely manner. The Service will review the eligible organization's policies and procedures to assure itself that the policies and procedures are reasonably likely to bring the organization into compliance on a prospective basis. The Service reserves the right to prescribe appropriate administrative procedures, but will first discuss the appropriateness of existing procedures with the organization. Where the current procedures, or proposed future procedures, are inadequate for complying with the relevant tax, withholding, and reporting requirements, the Service also reserves the right to deny relief under VCAP.

.04 *Other tax liabilities or issues*. If the Service discovers an unrelated tax lia-

bility or exemption issue while considering the request, that issue will remain outside the scope of the VCAP submission because it was not voluntarily brought forward by the organization.

.05 *Verification*. As part of the processing of the VCAP submission, the Service reserves the right to verify that corrections have been made to the eligible organization's tax, withholding, and reporting procedures on payments to alien individuals. Verification of such corrections does not constitute an examination of the books and records of the organization. If the Service determines that the eligible organization has not implemented or does not plan to implement the proper corrections and procedures, the case may be considered for examination. The Service does not contemplate opening examinations on VCAP submissions but reserves the right to do so. If the Service decides to examine the eligible organization, the examination will be commenced and completed as soon as possible, with the intention in most cases that the scope of the examination will be limited to tax and withholding obligations on payments to alien individuals and related issues.

.06 *Acknowledgment letter*. If the Service is satisfied at the conclusion of its review that the organization has instituted policies and procedures which ensure that the correct amounts of taxes on payments to alien individuals are withheld, paid, and reported to the Service on the proper forms and in a timely manner, then the Service will issue to the eligible organization an acknowledgment letter indicating that based upon its review, the eligible organization is at that time in substantial compliance with the tax, withholding, and reporting obligations governing payments to alien individuals. Once the organization has received an acknowledgment letter at the completion of the VCAP process, and provided that the organization in fact complies with the agreed upon withholding, payment and reporting procedures, the information submitted by the organization to the Service under VCAP will not be used as the basis to initiate an examination of the organization.

.07 *Failure to reach resolution*. If resolution cannot be reached because sufficient information is not timely provided to the Service or because agreement cannot be reached on correction or administrative procedures, the Service may consider the case for examination.

.08 *Applicability of §§ 6103 and 6110*. The information received or generated by the Service under VCAP is subject to the confidentiality requirements of § 6103 of the Code. The acknowledgment letter is not a written determination letter within the meaning of § 6110 of the Code.

.09 *Conferences*. If the Service initially determines that it cannot issue an acknowledgment letter because the parties cannot agree upon some correction or administrative issue, the organization or the organization's representative may be granted a conference with the Service, at the Service's discretion and upon request by the organization or the organization's representative. The conference can be held either in person or by telephone. If a conference is offered, the organization or its representative will be contacted by the Service representative.

SEC. 6. EFFECTIVE DATE AND SUNSET DATE

VCAP is effective on February 26, 2001. It will be available for submissions made on or before February 28, 2002.

SEC. 7. PAPERWORK REDUCTION ACT

The collections of information contained in this revenue procedure have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. § 3507) under control number 1545–1735.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The collections of information contained in this revenue procedure are in section 4.02 and section 4.03(2). This information will enable the Service to determine whether an organization qualifies for VCAP. The likely respondents are public and other not-for-profit colleges and universities and certain other charitable organizations.

The estimated total annual reporting burden is 346,500 hours.

The estimated average annual burden per respondent is 700 hours. The estimated number of respondents is 495.

The estimated annual frequency of responses is on occasion.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. § 6103.

SEC. 8. DRAFTING INFORMATION

The principal authors of this revenue procedure are Lowell G. Hancock of the Office of Pre-Filing Services, and Virginia Richardson of the Tax Exempt/Government Entities Division. For more information concerning VCAP, contact Mr. Hancock at (202) 874-1800 or (330) 375-5421 (not toll-free numbers), Ms. Richardson at (202) 283-8938 (not a toll-free number), or Neil Shepherd of the Office of the Associate Chief Counsel (Tax Exempt and Government Entities) at (202) 622-6040 (not a toll-free number).

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26 CFR 601.601: Rules and regulations.
(Also Part I, §§ 1001; 1.1001–3, 1.1275–2.)

Rev. Proc. 2001–21

SECTION 1. PURPOSE

This revenue procedure provides an election that will facilitate the substitution of newly issued debt instruments for outstanding debt instruments. Under the election, taxpayers can treat a substitution of debt instruments, in certain circumstances, as a realization event for federal income tax purposes even though it does not result in a significant modification under § 1.1001–3 of the Income Tax Regulations (and, therefore, is not otherwise an exchange for purposes of § 1.1001–1(a)). Under section 4 of this revenue procedure, taxpayers do not recognize any realized gain or loss on the date of the substitution. Instead, the gain or loss generally is taken into account as income or deductions over the term of the new debt instruments.

This revenue procedure modifies and supersedes Rev. Proc. 99–18, 1999–1 C.B. 736, which, as modified by Rev. Proc. 2000–29, 2000–28 I.R.B. 113, applies to substitutions that occur on or

after March 1, 1999. The significant changes to Rev. Proc. 99–18 are as follows:

.01 The newly issued debt may be debt issued in a qualified reopening;

.02 The outstanding debt may have been issued with premium; and

.03 The determination of whether a substitution does or does not result in a significant modification may be made on the substitution date or, in most cases, on the date that is two business days before the date on which the substitution offer commences.

SECTION 2. BACKGROUND

.01 Under § 1.1001–1(a), if gain or loss is realized from the exchange of property for other property differing materially either in kind or in extent, it is treated as income or as loss sustained.

.02 Section 1.1001–3 provides rules to determine whether a modification of the terms of a debt instrument results in an exchange of the original debt instrument for a modified instrument that differs materially either in kind or in extent. Under § 1.1001–3(b), a modification of a debt instrument results in an exchange for purposes of § 1.1001–1(a) if, and only if, the modification is significant.

.03 Section 1.1001–3 applies to any modification of a debt instrument, regardless of the form of the modification (including an exchange of a new instrument for an existing instrument). Under § 1.1001–3(c), a modification means any alteration, including any deletion or addition, in whole or in part, of a legal right or obligation of the issuer or a holder of a debt instrument, whether the alteration is evidenced by an express agreement (oral or written), conduct of the parties, or otherwise.

.04 In general, a modification of a debt instrument is a significant modification under § 1.1001–3 only if, based on all the facts and circumstances, the legal rights or obligations that are altered and the degree to which they are altered are economically significant. Section 1.1001–3(e) provides rules to determine whether certain modifications, such as a change in the yield or in the timing of payments, constitute significant modifications.

.05 If the terms of a debt instrument are modified to defer one or more payments and the modification does not result in an exchange under § 1.1001–3, § 1.1275–2(j) provides rules to account for the modified debt instrument. Under § 1.1275–2(j), solely for purposes of §§ 1272 and 1273 of the Internal Revenue Code, the debt instrument is treated as retired and then reissued on the date of the modification for an amount equal to the instrument's adjusted issue price on that date. As a result, the debt instrument is retested for original issue discount based on the instrument's adjusted issue price and the remaining payments, as modified, to be made on the instrument. If the debt instrument has original issue discount as a result of the modification, both the issuer and the holder account for the original issue discount over the remaining term of the instrument. *See* §§ 163(e) and 1272.

.06 An issuer may want to refinance and consolidate outstanding debt instruments in a way that increases the liquidity of the issuer's debt by concentrating more of the issuer's outstanding debt in a smaller number of issues. In general, if the terms of the newly issued debt are not materially different from the terms of the outstanding debt, substituting the newly issued debt for the outstanding debt does not result in a significant modification of the outstanding debt under § 1.1001–3. Therefore, the substitution of the newly issued debt for the outstanding debt in the refinancing and consolidation is not a realization event for federal income tax purposes. Under § 1.1275–2(j), however, some or all of the newly issued debt may have original issue discount in varying amounts, depending upon the terms of the outstanding debt for which the newly issued debt was substituted. As a result, the newly issued debt may not be fungible.

SECTION 3. SCOPE

This revenue procedure applies to the substitution of new debt for old debt if all of the following conditions are satisfied:

.01 Either—

(1) Debt instruments from a single new issue ("new debt") are substituted for debt instruments from two or more outstanding issues of debt ("old debt") (It is not necessary, however, for any single holder of the old debt to have held debt instruments from more than one of the outstanding issues.); or

(2) Debt instruments issued in a qualified reopening (as defined in § 1.1275–2) ("new debt") are substituted for debt instruments from one or more outstanding issues of debt ("old debt").

.02 The substitution does not result in a significant modification of the old debt under § 1.1001–3 and, therefore, is not a realization event under § 1.1001–1. This determination may be made either on–

(1) the substitution date, or

(2) the date that is two business days before the date on which the substitution offer commences, provided that date is no more than 30 business days before the date on which the substitution offer ends.

.03 The new debt and the old debt are publicly traded (within the meaning of § 1.1273–2(f)). If the new debt is issued in a qualified reopening of an outstanding issue of debt, that outstanding issue was also publicly traded.

.04 The old debt was issued at par, at a premium, or with less than a *de minimis* amount of original issue discount (within the meaning of § 1.1273–1(d)).

.05 The new debt is issued at par or with less than a *de minimis* amount of original issue discount or premium. For purposes of this condition, the issue price of the new debt is determined under § 1.1273–2 (rather than under § 1.1275–2 (j)), and the *de minimis* amount for premium is determined using the principles of § 1.1273–1(d).

.06 Neither the new debt nor the old debt is—

(1) a contingent payment debt instrument (within the meaning of § 1.1275–4),

(2) a tax-exempt obligation (as defined in § 1275(a)(3)), or

(3) a convertible debt instrument (within the meaning of § 1.1272–1(e)).

.07 All payments on the old debt and the new debt are denominated in, or determined solely by reference to, U.S. dollars, and the functional currency of the business unit issuing the new debt is the U.S. dollar.

.08 The issuer and one or more holders of the old debt make the election provided in section 4.01 of this revenue procedure.

SECTION 4. APPLICATION

.01 *Election*.

(1) *Manner of making the election*. The issuer and the holders make the election under this revenue procedure by agreeing in writing to treat the substitution for federal income tax purposes in the

manner described in section 4.02 through section 4.04 of this revenue procedure and to comply with all other provisions of this revenue procedure. The written agreement must be entered into no later than the last day of the month in which the substitution occurs.

For example, the written agreement to make the election may be evidenced by a statement in the offering documents for the substitution that—

(a) The issuer, by distributing the documents, elects under this revenue procedure to treat the substitution as a realization event for federal income tax purposes;

(b) Any holder of old debt that tenders its old debt for new debt as part of the substitution thereby makes the election under this revenue procedure; and

(c) The issuer and the holders who have tendered their old debt for the new debt ("electing holders") will comply with the provisions of this revenue procedure.

(2) *Statement attached to return*. If an election is made under section 4.01(1) of this revenue procedure, and if the issuer must file a federal income tax return for the taxable year in which the substitution occurs, the issuer must attach a signed statement to its timely filed (including extensions) federal income tax return for the taxable year in which the substitution occurs. On the statement, the issuer must—

(a) identify the old debt for which new debt was substituted,

(b) identify the new debt that was substituted for the old debt,

(c) indicate the issue price of the new debt (or, if the new debt is issued in a qualified reopening, the adjusted issue price of the new debt immediately after the substitution), and

(d) indicate that the election was made under this revenue procedure.

.02 *Treatment of substitution*. If an election is made under this revenue procedure, the issuer and the electing holders must report the substitution for federal income tax purposes as a repurchase of the old debt in exchange for the new debt in the taxable year in which the substitution occurs. The issuer, however, must account for this deemed exchange under the rules described in section 4.03 of this revenue procedure, and each electing holder must account for this deemed exchange under the rules described in section 4.04 of this revenue procedure.

.03 *Issuer's treatment*.

(1) *In general*. Except as provided in section 4.03(2) of this revenue procedure, the issuer must take into account over the term of the new debt any difference between the adjusted issue prices of the old debt at the time of the substitution and the issue price of the new debt (as determined under § 1.1273–2). If the aggregate issue price of the new debt that is transferred to electing holders as a substitute for the old debt is greater than the aggregate adjusted issue prices of the old debt for which it is substituted, the issuer treats the difference as a reduction in the aggregate issue price of the new debt. As a result, the difference is taken into account by the issuer over the term of the new debt as increased original issue discount or as reduced bond issuance premium (within the meaning of § 1.163–13). If the aggregate issue price of the new debt that is transferred to electing holders as a substitute for the old debt is less than the aggregate adjusted issue prices of the old debt for which it is substituted, the issuer treats the difference as an increase in the aggregate issue price of the new debt. As a result, the difference is taken into account by the issuer over the term of the new debt as reduced original issue discount or increased bond issuance premium.

(2) *Qualified reopening*. If the new debt is issued in a qualified reopening, the issuer applies the rules in section 4.03(1) of this revenue procedure by using the remaining term of the new debt instead of the term of the new debt and by using the adjusted issue price of the new debt immediately after the substitution instead of the issue price of the new debt.

.04 *Electing holder's treatment*.

(1) *In general*. Notwithstanding any provision of subtitle A of the Internal Revenue Code (including §§ 356(a) and 1276(a)), an electing holder does not recognize any gain or loss as a result of the deemed exchange. Instead, the holder's basis (immediately after the substitution) in the new debt is the same as the holder's adjusted basis (determined as of the date of the substitution) in the debt instruments for which the new debt was substituted. In addition, the holder's holding period for the new debt includes the holder's holding period for the old debt.

(2) *Market discount*.

(a) *In general*. If the stated redemption price at maturity of the new debt (as determined under § 1.1273–1(b)) is greater than the holder's basis (immediately after the substitution) in the new debt, the holder treats the difference as market discount on the new debt and the new debt as a market discount bond (unless the amount of the discount is *de minimis* within the meaning of § 1278(a)(2)(C)). *See* §§ 1276 and 1278 for the treatment of market discount. (The issue date of the old debt rather than the issue date of the new debt is used to determine whether the new debt is a short-term obligation for purposes of § 1278(a)(1)(B)(i).) See section 4.04(2)(b) below for the treatment of any accrued market discount on the old debt.

(b) *Accrued market discount*. The rules in this section 4.04(2)(b) apply if, as of the date of the substitution, there is any accrued market discount on the old debt that has not been taken into account by the holder as ordinary income. If, under section 4.04(2)(a) above, there is no market discount on the new debt or the amount of any market discount on the new debt is *de minimis*, the amount of accrued market discount on the new debt is zero, and the accrued market discount on the old debt is ignored. If, under section 4.04(2)(a) above, the amount of market discount on the new debt is more than *de minimis*, the lesser of this market discount and the accrued market discount on the old debt is treated by the holder, as of the date of the substitution, as accrued market discount on the new debt. (Solely for purposes of determining the accruals of any additional market discount on the new debt, the holder's basis is increased by the amount of the accrued market discount on the old debt that is treated as accrued market discount on the new debt.)

(3) *Bond premium*. If the holder's basis in the new debt (immediately after the substitution) is greater than the stated redemption price at maturity of the new debt (as determined under § 1.1273–1(b)), the holder treats the difference as bond premium on the new debt. *See* §§ 1.171–1 through 1.171–5 for the treatment

of bond premium.

SECTION 5. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 99–18, as modified by Rev. Proc. 2000–28, is modified and superseded.

SECTION 6. EFFECTIVE DATE

This revenue procedure applies to substitutions that occur on or after March 13, 2001. For substitutions that occur before March 13, 2001, Rev. Proc. 99–18, as currently in effect, continues to apply.

SECTION 7. PAPERWORK REDUCTION ACT

The collections of information contained in this revenue procedure have been reviewed and approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545–1647.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collections of information in this revenue procedure are in section 4.01. This information is required to determine whether an election has been made under this revenue procedure. The collections of information are required to obtain a benefit. The likely respondents are business or other for-profit institutions.

The estimated total annual reporting and/or recordkeeping burden is 75 hours.

The estimated annual burden per respondent/recordkeeper varies from 1/2 hour to 1 hour, depending on individual circumstances, with an estimated average of 3/4 hour. The estimated number of respondents is 100.

The estimated annual frequency of responses is on occasion.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

CONTACT PERSON

For further information regarding this revenue procedure, contact William E. Blanchard of the Office of the Associate Chief Counsel (Financial Institutions and Products) at (202) 622–3950 (not a toll-free call).

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26 CFR 601.202: Closing agreements. (Also Part I, sections 446, 482, 7121; 1.446-1, 301.7121-1)

Rev. Proc. 2001–22